## Module II: Understanding the Human Rights Act 1998

### Aim of the session:

To explore what the Human Rights Act is, its functions, how it benefits us, why it is under attack and what this means for human rights protections in the UK.

* Background to the HRA
* What does it cover?
* How does the HRA work?
* Taking action under the HRA
* Criticisms of the HRA
* The Independent Human Rights Act Review
* Analysis of questions within the IHRAR
* Current challenges and risks of reforming the HRA.
* Conclusions and Recommendations

**Slide 2**

**Slide 3**

### Background to the HRA

* The HRA and ECHR has its roots in the Universal Declaration of Human Rights (UDHR) a set of rights and civil liberties that was drafted following World War II on 10 Dec 1948 in the United Nations General Assembly to avoid a repeat of the human rights atrocities.
* It was the first international agreement on the basic principles of human rights. The UDHR is not legally binding but provides a common set of standards of rights for all peoples and nations.
* In 1949, Council of Europe established by 10 founding members including the UK in order to protect human rights and the rule of law and promote democracy in Europe. It now has 47 members.

**Slide 4**

###### Exercise 1: Council of Europe

**Question:** Is the Council of Europe part of the EU? Explain how it is/isn’t

Easy to get confused but the Council of Europe and the European Court of Human Rights has nothing to do with European Union. Council of Europe drafted ECHR. –focused on human rights and democracy whereas the European is focuses on trade and economics

* Member of the Council of Europe used the UDHR to draw up a treaty that would secure basic rights for citizen members that could be relied on in Court. This was known as the European Convention on Human Rights.
* It was signed in Rome in 1950 and came into force 1953. Drafting committee includes Sir David Maxwell Fyfe. Covers all countries in council of Europe.

Any citizen of member countries can bring cases to ECtHR.

* The HRA was drafted by Parliamentarians in 1998 and came into force in 2000,enshrining 16 provisions from the European Convention of Human Rights (ECHR) within domestic law.
* Before the HRA came into effect, court cases for violation of human rights were delivered at the European Courts of Human Rights (ECtHR) based in Strasbourg. This would often incur high expenses, and long waiting times for a trial.
* The introduction of the HRA thus enabled people to claim these rights in UK courts without having to take their cases to the ECtHR in Strasbourg, therefore allowing access to justice at a fraction of the cost and time. /allowing justice to be more accesible

**Slide 5-7**

### What does the Human Rights Act cover?

###### Exercise 2: The HRA contains 16 provisions from the ECHR. How many can you name?

**Activity:** Create a collaborative list of articles within the HRA in the chat box (Zoom).

* The Human Rights Act covers 16 articles from the ECHR:
* **Article 2: Right to life**

You have the right to live and not be unlawfully killed by the state. The state is required to take steps to prevent loss of life, and is also required to investigate suspicious deaths.

* **Article 3: Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment. This also extends the prohibition of deporting or extraditing where they may be subjected to such treatment.

* **Article 4: Prohibition of slavery and forced labour**

No one shall be held in slavery or servitude and no one shall be required to perform forced or compulsory labour. This does not apply to lawful sentences, military service, or work considered to be part of a person’s normal ‘civic obligations’.

* **Article 5: Right to liberty and security**

This includes the right not to be arrested unlawfully, this means you can only be stripped of this right where detention has a legal basis such as: upon conviction of a crime

* **Article 6: Right to a fair trial**

In civil and criminal proceedings, you are entitled to a fair and public hearing by an independent or impartial tribunal established by law. Where you are charged with a criminal offence, you have the right to presumption of innocence, to be informed of the nature and cause of the accusation against you, to have adequate time to prepare a defence, to access legal representation when the interests of justice so require, to challenge a witness and to access an interpreter if needed.

* **Article 7: No punishment without law**

You cannot be convicted for a crime that was not a criminal offence at the time it was committed. You cannot be punished with a penalty heavier than the one that was previously applicable at the time the crime was committed.

* **Article 8: Right to respect for private and family life**

Article 8 guarantees the right to privacy, family life, home and correspondence and protects against unnecessary surveillance or intrusion into your life.

* **Article 9: Freedom of thought, conscience and religion**

Article 9 protects the right to hold thoughts, belief and practise a particular religion or have no religion, including the protection of religious organisations as a representative body.

* **Article 10: Freedom of expression**

Article 10 protects the right to hold opinions and express your views as an individual or collective, even if they may be unpopular or disturbing, without interference from the State or public authority. It is often used to uphold journalistic freedoms and eradicating the obligation from having to disclose their sources.

* **Article 11: Freedom of assembly and association**

Article 11 protects the right to association such as trade unions, political parties, or any other association or voluntary group as well as the right to assembly such as peaceful protests.

* **Article 12: Right to marry**

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

* **Article 14: Prohibition of discrimination**

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

* **Protocol 1, Article 1: Protection of property**

The protection of property grants you the right to enjoy your property and possessions whilst preventing state interference with your property, confiscation of your possessions or placing restrictions on its use without justification.

* **Protocol 1, Article 2: Right to education**

Protocol 1, Article 2 means that no child can be denied an education which entails right to an effective education, access to existing educational institutions, education in the national language, and official recognition upon leaving education.

* **Protocol 1, Article 3: Right to free elections**

granting every individual the right to participate in free and fair elections at frequent intervals and by secret ballot

* **Protocol 13, Article 1: Abolition of the death penalty**

The state cannot enact the death penalty as a punishment for crime.

**Slide 8-9**

###### Exercise 3: Define absolute/non-absolute rights

**Question:** What does it mean if a right is absolute/non-absolute?

* Not all of the rights contained within the HRA are without limitation. Some of these rights are ‘absolute rights’ which means they cannot be lawfully limited in any circumstance. This includes articles such as the prohibition of torture and slavery and the right to a fair trial.
* However, most of them are “non-absolute”, meaning there are instances where they can be restricted in exceptional circumstances such as national security. Some of these limitations may already be specified within the description of the right itself and must meet the tests of proportionality, necessity and lawfulness.

**Slide 10-17:** Case studies (see appendix)

**Slide 18-20**

## How does the Human Rights Act work?

###### Exercise 5: The HRA in action

**Question:** How does the Human Rights Act work? Who has obligations under it?

* The HRA serves three primary functions:
* Placed obligations on the state and public authorities (e.g. police, local authorities, hospitals, schools, government bodies) to uphold and protect rights and act in accordance with the HRA
* The HRA requires public bodies to respect and act in accordance with the HRA. If a public authority has breached a right and has failed to resolve Nit, victims are then able to bring their cases to court to seek justice.
* Ensuring that laws are compatible with the ECHR
* The HRA requires the government to ensure and explain how new legislation is compatible with the HRA. The HRA requires courts to interpret existing laws in a way which is compatible with rights contained in the HRA. If this is not possible they are able to make a “declaration of incompatibility” and Parliament can decide how to amend the law.
* Allowing individuals and organisations to seek justice in UK courts. Protection is afforded to anyone within the jurisdiction of the UK, including foreign nationals.:

**Slide 21**

## Taking action under the Human Rights Act

* If you think a public authority has breached your human rights, you may be able to take action under the Human Rights Act 1998. (The act only covers violations by public authorities meaning you cannot take action against an individual under the HRA.)
* A human rights breach may constitute either an act that has interfered with your rights, or failure to act for instance not protecting you against harm.
* First it is important to identify which human right the authority in question has breached. For example, being denied life-saving operation or treatment would violate your right to life under article 2.
* Before considering legal action it is best to try and resolve the problem with the public authority to evade the cost and time of litigation. This can be via either a formal or informal complaint that should include the date and time of the incident, who was involved details of the incident and how it has affected you, and how you would like the organisation to remedy the situation. However there are strict time limits for taking legal action and therefore it is best to raise the issue as soon as possible.
* If the public authority has failed to resolve the complaint, it is possible to involve external organisation to review the complaint such as an ombudsman. However this may take some time, in which case it may be better to take the case to court.
* Taking legal action can be costly and a lengthy process. It is therefore to get advice from experts such as Citizens Advice bureau before resorting to legal action.
* Judicial review can only be used where there is no alternative route of appeal. For instance an employment dispute would be dealt with by an employment tribunal thus where available, other avenues must be explored before launching a judicial review. Judicial review can only be used where there is no alternative route of appeal.
* Judicial review is a special legal procedure that allows you to challenge the actions or decisions or public bodies that have interfered with your human rights. These applications are made to the High Court.
* There are strict limits for judicial reviews and thus application must be made as soon as possible. Cases must be brought within three months.
* If the court believes there to be an arguable case, it can offer several remedies. Quashing orders nullify the decision made by the body and require them to remake the decision, mandatory orders require the body to take positive action to fulfil its duty under the HRA and prohibiting orders prevent the authority from doing a particular action. The Court can technically offer financial compensation but this is in very exceptional circumstances and only if monetary loss was incurred.

###### Exercise 4: The HRA in action

**Activity:** Discuss the following case studies and decide which Article is engaged and whether the claim under the HRA was upheld and why.

#### 19-year-old murdered by racist cell mate

#### Zahid Mubarek, a 19-year-old youth detainee and “model prisoner” was due to be released on 21 March 2000 after being sentenced to 90 days for theft. Just five hours prior to his release, his white cellmate, Robert Stewart, with a recorded history of racism and violence, beat him to death. Beyond a few internal and private investigations, no public inquiry or inquest was held, and the Secretary of State rejected the family’s request for one. The Mubarek family were able to petition the Home Secretary to open an independent investigation into Mubarek’s death.

**Under which article was the investigated initiated and was the case successful?** *The court found the detention centre liable for a series of institutional failures including Mubarek’s death and disregarding racism within the facility.[[1]](#footnote-1)*

***Religious dress***

A school that offered a range of uniform options in accordance with local mosque guidelines, decided to prohibit a female Muslim pupil from wearing a jilbab. The family then made a claim under the HRA.

**Which article does this case pertain to and was the claim successful?**

The claim was made on the grounds that there was interference with right to education

*The court found that the school’s decision did not interfere with Article 9 because in this case it was the pupil’s choice to attend a school where such policy existed and other schools nearby were available to her that permitted the wearing of jilbab*

[***https://www.casemine.com/judgement/uk/5a8ff76e60d03e7f57eac6b2***](https://www.casemine.com/judgement/uk/5a8ff76e60d03e7f57eac6b2)

***Eviction of Gypsy travellers [[2]](#footnote-2)***

After residing on a Traveller site for 13 years, a gypsy family were evicted on the grounds of disruption/nuisance.

### The family challenged the council’s decision on the basis that their eviction from the site was an unjustifiable breach of their Article 8 right to respect their home. The Court found that the procedural safeguards of rights were not considered with regards to their nomadic lifestyle and their precarious situation. As such, the Court ruled the eviction to be an unjustifiable violation of Article 8 because the grounds for eviction on public interests were not proportionate to the consequences of the decision. Disruption to the public not weighty enough reason that would have rendered them effectively homeless. The Court found that there were no such grounds and as such the decision infringed Article 8.

**Slide 22**

## Why is the Human Rights Act so important?

* Human rights transgressions, even if unintentional, are inevitable particularly amongst vulnerable and marginalised groups that have the least representation and visibility amongst policymakers.
* Therefore, the HRA has been especially important for groups such as children, women, people with physical and mental disabilities, refugees and migrants, BAME communities, sexual minorities, religious minorities, and the homeless in offering meaningful protection and equal treatment under the law as well as offering greater recourse to hold bodies accountable for human rights failures.
* In turn, these cases under the HRA have set a precedent clarifying the personal rights of every citizen, and providing greater clarity of obligations for public bodies.

###### Exercise 6: Prominent examples

**Question:** Can anyone think of any examples or case studies where the HRA helped human rights victims.

* As recent examples, it secured justice for Hillsborough victims, as well as aiding the Grenfell campaign. After fans were blamed for the disaster and Hillsborough families denied an inquest, the HRA enabled the victims’ families to push for a proper inquest that uncovered the reality behind the tragedy and finally held those responsible to account almost 30 years later. Similarly, in response to the Grenfell Tower Inquiry the watchdog Equality and Human Rights Commission found[[3]](#footnote-3) public authorities and local government failures to have breached Article 2 – right to life.[[4]](#footnote-4)

**Slide 23**

## Common criticisms of the Human Rights Act

* Wider miseducation on the HRA has meant misconceptions regarding the HRA proliferate fuelled by hostile press and factions of the Government.
* Since the HRA came into force, it has been a longstanding target of successive Conservative politicians and elements of the press that bemoan issues that the HRA has engendered with regards to migration and national security, disproportionate protection of minorities and criminals and encroachment of the ECtHR on the UK’s democratic sovereignty.

###### Exercise 7: Attacks against the HRA

**Activity:** Match the quote to the politician or headline. (Quotes on slide)

* It has led to a **compensation culture** that has only served to line the pockets of lawyers.
	+ There is no such thing as trivial cases with regards to the HRA especially since the Court will only hear your case regarding a breach of a substantive right.
	+ there has not been a barrage of lawsuits Contrary to this myth,– in fact stats show that legal actions halved from 2002 when the HRA came into effect and 2013. (714-327)
	+ Even if claims of a litigious, compensation culture were to be true, it would not be due to the HRA. The primary objective of a Human Rights Act claim is to address and resolve human rights breaches- monetary compensation is rare and only granted to compensate for actual material loss suffered.
* It curbs journalistic freedom through imposing “privacy laws” on the press.
* There has been criticisms that the HRA undermines freedom of speech under Article 8 (respect for privacy and family life), particularly when the press is reporting on the misconduct of public figures.
* In reality the HRA strikes the balance between the right to privacy and the right to free expression. The HRA has protected and strengthened the press’ right to free speech under Article 10. Article 10 protects press freedom in two ways: preserving journalistic rights to report on issues of public concern or interest and exempting journalists from having to revealing the sources of their information unless in cases of public security.
* This is counterbalanced by the right to privacy, which protects against defamatory or invasive reports that breach the individual right to privacy including media reports into the lives where Courts deem it to be contrary to public interest to disclose private information.
* It is an alien feature imposed on us by Europe
* Not only was the HRA passed by the UK Parliament in 1998, the UK government, namely Conservative MP, David Maxwell Fyfe, also played a vital role in the negotiations and drafting of the Convention which it adopted voluntarily in 1951.
* Furthermore, the Convention was adopted by the Council of Europe in 1950 of which the UK was a founding member. It was a body, completely independent of the EU ­and set up after WWII to promote democracy, human rights and the rule of law in Europe.
* The UK courts are straitjacketed by the decisions of the ECtHR
	+ Section 2 of the HRA requires UK courts merely to “take into account” any decision of the ECtHR for cases pertaining to rights contained within the ECHR.[[5]](#footnote-5) However, UK courts are not bound by this case law and there are various cases where the UK has readily diverged from ECtHR rulings.
	+ ECtHR judgements are important because they offer a minimum set of rights standards which Strasbourg sets. It is logical that the UK can give more rights than this standard but not less. UK is granted a margin of appreciation that considers national context but that should not remove the minimum protection of rights. Strasbourg court have had a positive influence in the interpretation and enforcement of rights in the UK, whilst respecting British traditions and culture.
	+ If you do take your case to Strasbourg and you win, the UK government has to abide by that ruling. But stats show that the UK rare loses cases so this myth of Strasbourg’s excessive influence is inflated.
* It is a “Villians Charter” that protects criminals and terrorists at the expense of the general public.
* Narratives have developed that human rights judgements are disproportionately focused on minority rights and the protection of criminals whilst compromising national interest.
* A key example was that the HRA protected Abu Qatada, who was unable to be deported due to concerns that it would breach his rights to freedom from torture.[[6]](#footnote-6) The ECtHR ruling blocked his deportation to Jordan because it would violate his right to a fair trial due to the risk of evidence obtained by torture. He was eventually deported in 2013 upon agreement with the Jordanian government that the use of evidence from torture would not be used against him.
* The prohibition against torture is a universally absolute right meaning it can never be justified- the HRA otherwise does not stop the deportation of terrorists that threaten national security.
* This case highlights that is only the controversial stories that garner media and public attention and dominate debates on the HRA –stories about how the HRA has transformed ordinary lives for the better fail to make the headlines.
	+ **True or False.** A man has been spared deportation under Article 8 (right to family life) because he had a pet cat.

**False:** In 2011, it was reported in the Sun, Sunday Telegraph, Daily Mail) that Theresa May that the HRA had prevented the deportation of a Bolivian man because he had a pet cat. In fact it was his long term relationship with a British woman that made the deportation disproportionate. The reference to the cat was made as a joke by the immigration judge.

* The Judiciary excessive interfere in areas of policy and politics.
	+ Ideas of judicial overreach in political decision-making is commonplace but misguided.
	+ The HRA actually strikes a careful balance between parliamentary sovereignty, judicial adjudications and the role of the Government. The Courts cannot quash legislation- they are limited to making declarations of incompatability which means that it us up to Parliament as to whether they choose to amend legislation or ignore the DoI.
	+ Nevertheless, the judiciary suffers a large proportion of the flack when it comes to criticisms of the HRA, especially with regards to political agendas in areas of immigration and counter-terror.
	+ As but one example, in 2016, three High Court judges challenged[[7]](#footnote-7) the invoking of Article 50 (a clause that would officially trigger the Brexit process) under royal prerogative powers, stating that Article 50 required parliamentary approval.
	+ This decision incited widespread criticism by politicians and media alike citing judicial activism and alleging the Courts strayed too far onto political plains.[[8]](#footnote-8) Sajid Javid, the then local government secretary, claimed the judges were attempting to “frustrate the will of the people”[[9]](#footnote-9); The Daily Telegraph ran a headline “Judges v the people”[[10]](#footnote-10); the Daily Mail described them as “enemies of the people.”[[11]](#footnote-11); the Daily Express “three judges yesterday blocked Brexit.” [[12]](#footnote-12)
	+ These sensationalist headlines misrepresent the role of the judiciary – the judges did not “block Brexit” or overturn the will of the people but merely established constitutional protocol.

**Slide 24**

## The Independent Human Rights Act Review

* The aforementioned concerns formed the basis of proposals to reform or repeal the Act that have been long on the Conservative Party’s agenda
* In 2010 and 2015, there were plans to replace the Human Rights Act with a “British Bill of Rights and Responsibilities” intended to break the formal link between European and British courts and “restore common sense to the application of human rights in the UK
* From this pledge it was evident that a new bill of rights would subvert the universal application of rights in the UK where the government could essentially pick and choose when to apply rights and to whom as well as the prospect of disregarding ignore any ECtHR judgements that would be perceived as inconvenient. This will naturally have led to lower of standard of protection than other member nations.
* In 2017, the Conservative Party manifesto assured[[13]](#footnote-13) the public that the HRA would not be repealed or replaced whilst Brexit negotiations were taking place, but that they would instead evaluate the human rights legal framework once the UK had left the EU.
* The 2019 Conservative Manifesto: only contained reference to “updating” Human Rights Act amidst wider constitutional reforms
* Instead of a commission that would explore different aspects, the PM decided to address each issue separately in view of fast-tracking the process.
* As such, the Independent Review into Administrative Law (IRAL) was launched in July 2020[[14]](#footnote-14) that aimed to examine judicial reviews and in December 2020 IHRAR was launched with call for evidence in Jan 2021 which MEND submitted to. Findings are due in summer 2021.
* The review will consider how the HRA is working in practice and whether any change is needed, specifically focusing on the relationship between the Executive, Legislature and Judiciary and relationship between ECtHR and UK Courts.

**Slide 25**

## Concerns

* MEND found various issues with the basis and framing of the review, particularly the evident bias within the questions and the failure to allow for an adequate and faithful assessment of the HRA.
* **Narrow focus:**
* Any credible review must provide a holistic and comprehensive overview yet the IHRAR is narrow in focus and provides only a superficial analysis surrounding the balance of powers.
* The Review says it plans to look at 20 years of the HRA’s operation yet none of the questions explore how the HRA has operated for the people it serves. This risks obscuring the important ways in which it has facilitated and protected victims of human rights breaches.
* **Timing:**
* Launched not only during a pandemic but at a time when the criminal justice system is already under immense pressure with court backlogs exacerbated by Covid.
* Amidst the precariousness of a pandemic and the strain on our justice system, the prospect of having vital human rights protections diluted becomes increasingly concerning.
* **Framing:**
* The way the questions are framed problematize the HRA for instance asking whether the courts have been “unduly drawn into areas of policy”.
* The overall phrasing of the questions imply a clear bias towards advocating for reform.

**Slide 26**

## Analysis of questions

###### Exercise 8: Dissection of questions

**Question:** What is an open/closed/leading/funnel question?

**Activity:** Split audience into different groups and allocate a question per group. Ask the groups to analyse their respective question looking particularly at the:

* Type of question
* Neutrality v bias
* Wording/phrasing of the question
* Argument implicit in the question
* Why the question is framed in that manner

**Additional task (optional):** Out of the list, choose which common criticism of the HRA best matches their question.

Regroup, go through each question and discuss.

***How has the duty to “take into account” ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?”***

* Initial question appears neutral and balanced (inquiring about general practice regarding the consideration of ECtHR jurisprudence),
* It then narrows into a leading question designed to prompt a specific response. It is also a closed question and implies existence of a problem.
* MEND dispelled this claim outright. Section 2 merely requires judges to take into account Strasbourg case law- they are not bound by it and thus domestic sovereignty is upheld.

***When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?***

* The question echoes the concerns underpinning bill of rights that the UK does not enjoy a sufficient “margin of appreciation”
* Second question again implies need for change.
* The margin of appreciation is the degree of scope and discretion the ECtHR gives to member states when it deems national governments to be better suited to assess rights issues according to their domestic context.
* This concern is misguided, case studies show that in practice ECtHR tends to comply with decisions of member states thanks to the margin of appreciation.

***Does the current approach to ‘judicial dialogue’ between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?***

* The question is leading – “satisfactorily permit” implies that the current approach is restricting courts to express disagreement with ECtHR judgements.
* The latter part of the question equally implies an existing problem that suggests the HRA is potentially undermining judicial dialogue.
* Our answer dispelled this suggestion through exploring the fact that
* Case studies show UK courts to readily depart from ECtHR decisions
* Current system facilitates constructive dialogue just as domestic courts can take into account ECtHR jurisprudence, UK courts can equally exert influence on the ECtHR regarding issues of national context.
* Altering the relationship may result in more cases against the UK reaching the ECtHR because this dialogue has been obstructed.
* In 2020, less than 1% of applications to Strasbourg were UK cases. This shows as a result of this dialogue, the ECtHR are generally likely to agree with the decisions of national courts.

***a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:***

***i. Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?***

***ii. If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?***

***iii. Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?***

* The biases are particularly patent within the framing of these questions.
* Question one consists of the negative assumption that legislation has been interpreted inconsistently with Parliament’s intention.
* Question two relies on a false mutual understanding that the Act should be repealed or amended. Bias evident in “if yes”
* Question three reveals the government’s aim to “enhance the role of Parliament” and imposes the presumption that Section 4 of the HRA should even be revised in the first place.
* Our response maintained that there is no case for amending Sections 3 and 4 as they fully protect and maintain the separation of powers whilst upholding the sovereignty of Parliament. This is highlighted in the fact there have only been 43 DOI’s over the past 20 years.
* The HRA maintains a careful balance between roles of government, parliament and courts. Any amendment to the powers granted by the HRA to the courts would weaken their ability to uphold the rule of law and protect and fundamental human rights.

**Slide 27**

## Current challenges and risks of reforming the HRA

* **Legal aid**
* Sweeping cuts to funding across the Criminal Justice System (reduction in spending overall between 2010 and 2019 has been around 25%[[15]](#footnote-15) resulting in the closure of 295 court facilities across England and Wales)[[16]](#footnote-16) but particularly to legal aid, has left victims of human rights abuses hung out to dry.
* The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 introduced changes to the scope and eligibility for legal aid and the rates paid for legal aid work in various areas of law such as family, social welfare, housing, employment and immigration.
* LASPO initially intended to trim £350m off the annual legal aid budget; it eventually reduced spending by more than £600m a year As a result legal aid support in cases dropped by 46 percent within a year of LASPO being introduced.[[17]](#footnote-17) Between 2010 and 2018 the number of people accessing legal aid fell by 82%. [[18]](#footnote-18)
* This has led to increased pressure on the criminal justice system to meet the demand on reduced budget.
* This has also given rise to an increase in litigants in person which has often led to perpetrators going virtually unchallenged due to their legal inexperience.
* Criminal sphere- “innocence tax” - this means that if you are wrongly accused of a crime you may be denied legal aid, and if exonerated you are refused recompense for the costs of defending yourself.
* Reforms not only deny people access to justice but compound the precarious situations of vulnerable people seeking legal help e.g homelessness, rising debt.
* Evidence has shown that the groups most dependent on legal aid, such as women, disabled people, and those from BAME backgrounds, have been disproportionately affected by legal aid reforms.[[19]](#footnote-19) For instance, the restriction of legal aid in immigration cases has disproportionately impacted migrants and refugees already facing acute hardships and inequalities due to their immigration status such as language and literacy barriers, mental health problems, poverty, isolation, financial issues and homelessness.[[20]](#footnote-20)
* Elsewhere these cuts have further compounded existing disparities in accessing justice placing certain groups such as BAME at an additional disadvantage. For example BAME defendants are consistently more likely to plead not guilty than White defendants.
* **Brexit and the EU charter of fundamental Rights**
* The HRA has not been the sole rights framework but has been complimented by the Charter in the promotion and enforcement of human rights.
* The Charter offers extra protection in the following three ways:
* There are some important Charter rights - for example the right to human dignity; protection of a child’s best interests; and the free standing right to non-discrimination – which have no equivalent in UK rights laws and have thus left significant gaps in substantive rights.
* Even regarding rights that are already present in UK law, the Charter offers more comprehensive protection such as Article 8 of the Charter in relation to data protection rights.
* With the rights that do have an equivalent, the Charter offers more robust mechanisms of protection in conferring the ability to enforce rights, pursue legal action, and seek remedies. For instance anyone under the Charter anyone with “sufficient interest” can bring a claim, in comparison with the HRA, which is limited to only victims of human rights breaches. Secondly, the Charter grants Courts more powers in quashing legislation that is incompatible with the Charter.
* Thus the recent loss of the EU Charter of fundamental rights has removed an additional layer of human rights protection, rendering the prospect of having our human rights further eroded under the HRA, ever alarming.
* **International human rights reputation**
	+ Reforming the HRA may simultaneously be viewed as disassociation from international human rights norms whilst creating layers of legal uncertainty particularly in undoing decades of rights assimilation in the UK legal tradition.
	+ Any erosion of our body of human rights will inevitably stain the UK’s international human rights reputation
	+ Apparent disregard for international human rights norms and limiting the scope of Convention rights would also limit the power and legitimacy of the UK in speaking out against rights violations on a global stage.
	+ Similarly, it would undermine the ability of the UK to credibly comment on Strasbourg case law (whilst shielding itself from its guidance) in the event of severing or weakening ties with the ECtHR.

**Slide 28**

## Conclusions and recommendations

* The current challenges hampering pathways to justice means the reliance upon the HRA is all the more critical for the preservation of human rights in the UK.
* The HRA has undoubtedly transformed the human rights landscape in securing and advancing the protection of human rights since it came into force.
* It is therefore vital it is protected from any amendments that may limit the standards of rights protection.
* Therefore, we propose that there is no case to reform the HRA and that any changes to the human rights framework must only be in pursuit of fortifying the powers contained within the HRA.
* MEND therefore proposes the following recommendations:
* Preservation of the Human Rights Act in its current form
* The recognition of politically motivated attacks on the judiciary and theneed for effective oversight and accountability of governments.
* The justice system as a whole to be prioritised in terms of funding so that the most vulnerable have access to justice.
* The IHRAR panel to sincerely engage with civil rights groups and community stakeholders in its review.
* Wider consultative and participative engagement to be done in this area to empower communities and vulnerable groups so that they are aware of their rights and how to access them.
* Commit to the full implementation of the Royal Charter on press regulation.

APPENDIX: CASE STUDIES

###### Case 1: Article 2 (Right to Life)

In January 2000, 19-year-old Zahid Mubarek was convicted of shoplifting £6 worth of goods from a supermarket and was sentenced to serve ninety days at Feltham Young Offender Institution. However, in the early hours of the morning of his scheduled release, Zahid was attacked by his racist cellmate, Robert Stewart. Using a broken-off table leg as a deadly weapon, Stewart hit Zahid eleven times, inflicting terrible injuries on Zahid as he slept. Zahid never recovered from the massive head injuries inflicted by Stewart and died a week later in hospital, in March 2000.

Robert Stewart, also nineteen at the time of Zahid’s murder, already had an extensive prison career which encompassed six custodial sentences. Previous convictions included the attempted murder of another inmate, stabbing a fellow inmate below the eye, and racial harassment. His prison records also suggested that he had a long history of mental illness and extreme racist views. A year before Zahid was murdered, one prison officer noted on Stewart’s records: ‘I do feel that this lad is a disaster waiting to happen, he cannot be trusted…’

Another Prison officer described Stewart as a ‘very disturbed young man’ who should not have been sharing a cell with anyone.
On his arrival at Feltham, it was commented by a senior Prison Officer that Stewart had the largest prison file he had ever seen.

The Mubarek Family spent four years spearheading a long and arduous campaign, seeking answers to these questions and forcing the Government to hold a Public Inquiry into the death in custody of Zahid.

Aseries of legal challenges made by the family were appealed by the then-Home Secretary, David Blunkett, thus preventing an Inquiry from taking place. Eventually, the Mubarek Family launched an appeal to the House of Lords who voted unanimously to overturn the Home Secretary’s decision.

In July 2004, David Blunkett was legally bound to comply and announced the Zahid Mubarek Public Inquiry. The Inquiry was to last for over 18 months

Source: <https://thezmt.org/zahid-mubarek/>

###### Case 2: Article 3 (Prohibition of Torture)

In 2009, John Worboys, the ‘black cab rapist’, was found guilty of sexually assaulting 12 women. Police now believe he used ‘date-rape’ drugs to attack over 100 female customers between 2002 and 2008. Two women, known as DSD and NBV, both reported their belief that they had been raped to the police. Both felt that during and after the investigations, the police didn’t believe their stories or take the inquiries seriously.

The question, in this case, was whether the police, in failing to investigate allegations effectively, subjected victims to ‘inhuman or degrading treatment’, breaching the Human Rights Convention.

Date-rape drugs confuse victims and often cause them to lose their memories. The difficulty this causes for women who suspect they may have been raped is recognised in police guidelines relating to drug-related assault. The Court found that in many attacks subsequently attributed to Worboys, these guidelines were not followed. Police neither believed allegations, nor conducted enquiries properly. This had a profoundly damaging effect on the women’s mental health and meant that the Police failed to ‘join the dots’ between similar cases for more than six years.

The Courts said the failings did result in ‘inhuman and degrading treatment’. This shows how important it is that authorities take seriously and investigate thoroughly accusations of sexual assault.

Source: <https://eachother.org.uk/stories/the-black-cab-rapist/>

###### Case 3: Article 5 (Right to Liberty and Security)

In December 2001, Parliament passed the Anti-Terrorism Crime and Security Act 2001 (ATCSA), Part 4 of which allowed the Home Secretary to order the indefinite detention of foreign terrorist suspects who could not be deported on the grounds that they faced a real risk of ill-treatment contrary to Article 3 ECHR. In order to do this, the government derogated from Article 5 under the ECHR.

In addition, the only right of appeal for those detained under Part 4 was by way of the Special Immigration Appeals Commission (SIAC), established by the Special Immigration Appeals Commission Act 1997 following the Chahal judgment of the European Court of Human Rights.(([1996] ECHR 54)) Due to the use of sensitive intelligence materials (such as evidence from covert surveillance), the evidence against detainees was partly open (which the detainee would view and which his or her lawyers would be able to challenge), and partly closed (which the detainee and his lawyers would be prohibited from seeing). Instead of being able to challenge the closed evidence, the detainee would be represented by a special advocate who would argue the case on his behalf in the closed proceedings but would not be allowed to communicate with the detainee.

Despite major criticisms of Part 4 from the Newton Committee of Privy Counsellors, appointed to review ATCSA in 2003, the regime of indefinite detention was not ended until the House of Lords’ judgment in the Belmarsh case in December 2004 found that it was incompatible with Articles 5 and 14 ECHR.

Source: <https://justice.org.uk/counter-terrorism-human-rights/>

###### Case 4: Article 6 (Right to a Fair Trial)

**What are control orders?**

Control orders are an anti-terrorism power which allows the secretary of state to impose strict conditions on a terrorist suspect (the ‘controlee’).

The conditions can include a curfew of up to 16 hours per day, electronic tagging, travel restrictions of a few miles in non-curfew hours, regular reporting to a monitoring company, regular home searches, and strict limits on interpersonal communication. There are sometimes other consequences of the order, such as friends being unwilling to visit them.

So, control orders effectively amount to house arrest. As the name suggests, they allow the government to “control” the lives of a suspect.

**By what power?**

Control orders are an invention of the [Prevention of Terrorism Act 2005](http://www.legislation.gov.uk/ukpga/2005/2/contents) (‘PTA’) which came into force in March 2005.

They were introduced after the House of Lords (now the Supreme Court)[ruled](http://www.bailii.org/uk/cases/UKHL/2004/56.html) in the now famous [*Belmarsh*case](http://www.bailii.org/uk/cases/UKHL/2004/56.html), that a regime introduced after the September 11 2001 attacks, which allowed the secretary of state to detain a suspected international terrorist with a view to his intended deportation, was incompatible with the [right to liberty](http://ukhumanrightsblog.com/introduction/incorporated-rights/article-5-of-the-echr/) under the European Convention.

**So what’s the problem?**

As Mr Justice Silber put it in a [recent speech](http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/speech-by-silber-j-add-bar-council-conference.pdf) on the topic, control orders “seek to resolve conflicts of interest of great importance in constitutional and personal liberty terms“.

The main problem is that the orders are imposed in the early stages of an investigation, and the secretary state need only show “reasonable grounds”  of suspicion to impose one. In an ordinary criminal case, at least a charge would be required to impose such strict conditions, so the orders go far beyond the ordinary powers of the police.

This raises a number of difficult issues. First, the basic conflict between the rights of an individual to freedom against the rights of the state to protect its citizens from terrorism. The security services have [long argued](http://www.bbc.co.uk/news/uk-politics-12106359) that the orders are an important practical means of fighting terrorism, and that due to the extreme effects of a successful terrorist attack, the restrictions on liberty are justified.

However, the counter-argument is that the orders represent a breach of human rights as well as basic principles of common law due process. Put simply, the state must prove its case before a person can have his (all ‘controlees’ thus far have been male) liberty so severely circumscribed.

A second issue which has attracted the attention of the courts is to what extent controlees should know the case against them. On the one hand, knowing the case against you is a basic requirement of a fair trial under [article 6](http://ukhumanrightsblog.com/introduction/incorporated-rights/article-6-of-the-echr/)of the European Convention. On the other, the security services have often argued that disclosing sensitive secret evidence in court could itself put lives at risk.

The evidence also often comes from other states’ intelligence services, and, as the head of MI6 put it in a [recent speech](http://www.guardian.co.uk/uk/2010/oct/28/sir-john-sawers-speech-full-text), intelligence services operate according (somewhat ironically) to the “control principle”, whereby “the service who first obtains the intelligence has the right to control how it is used”. So it is possible that by forcing evidence to be disclosed, the intelligence services are jeopardising relationships with partners. Breach of Article 6.

Source: <https://ukhumanrightsblog.com/2011/01/06/control-orders-what-are-they-and-why-do-they-matter/>

###### Case 5: Article 9 (Right to Religious Expression)

Mr Bashir is serving a fifteen-year prison sentence. In January last year he, like many prisoners, was required without any prior warning to provide a urine sample for a drugs test, following the Prison Service’s [mandatory drug testing (MDT) policy](http://www.hmprisonservice.gov.uk/resourcecentre/psispsos/listpsos/index.asp?startrow=51). In his case the test was not random, but because there was reasonable suspicion that he had taken illegal drugs.

However, it transpired that Mr Bashir was on the final day of a three-day voluntary fast, undertaken on the advice of an Imam as spiritual preparation for his Court of Appeal hearing the next day. Having not drunk anything for some time, he unsurprisingly was not able to provide a large enough sample. When he was offered water on several occasions he refused, explaining that he was fasting. As a result he was charged with failing to obey a lawful order. At a hearing before the Independent Adjudicator he was convicted and given an extra 14 days imprisonment as punishment.

The MDT policy makes special provision for Ramadan (and comparable religious festivals that require fasting), allowing drug testing still to be carried out, but very early in the day. The MDT policy states that during Ramadan Muslim prisoners should not be manoeuvred into a position where they have to disobey an order. However, Mr Bashir’s fast was not during Ramadan and not compulsory. It was a voluntary, individual act. The undisputed evidence before the adjudicator from the prison Imam was that Mr Bashir was a devout Muslim, that it was a recognised practice in Islam to engage in an individual, voluntary fast for three days for particular personal reasons, and that ‘if you start to fast you should go straight with it to the end‘. However, the adjudicator held that while the MDT policy made special provision for religious festivals, this was not a religious festival and Mr Bashir therefore had to bear the consequences of his personal decision, which was that he had disobeyed a lawful order.

HJ Pelling QC suggested that there were various factual scenarios which could have meant Mr Bashir’s Article 9 rights were not breached. For example, if there was a system whereby prisoners had to report in advance that they were fasting, which Mr Bashir had failed to comply with. Or if there was evidence that under Islamic law a fast could be broken if necessary (such evidence was actually provided in the judicial review, but it hadn’t been put before the adjudicator so it was irrelevant). Or if there was evidence that a claim to be fasting was false or not a genuine belief -e.g. where a prisoner had been seen eating the day before, or where the Imam had never seen head nor tail of the prisoner before he suddenly declared out of the blue when a drugs test was required that he was a devout Muslim.

Moreover, if it was demonstrated that there were good reasons in a particular case why a drugs test had to be conducted at a certain time, this could make an interference with religious freedom proportionate.

Source: <https://ukhumanrightsblog.com/2011/06/07/religious-freedom-doesnt-stop-at-the-prison-gate/>

###### Case 7: Article 11 (Right to Assembly and Association)

Up to 159 protesters were onboard coaches which were stopped from reaching RAF Fairford, in Gloucestershire, in March 2003.

A judge has ruled that police violated their rights following a hearing of 12 test cases.

Gloucestershire Police has apologised for its actions.

The attempted rally came two days after coalition forces launched raids on Iraq from the base.

Police stopped the buses at Lechlade, detaining the group on the coach and sending them back to London under heavy police escort.

They were not allowed to stop at service stations to use the toilet or buy food and drink along the way, with many forced to use plastic containers to relieve themselves onboard.

Judge David Mitchell said the campaigners had endured "humiliating circumstances" and many were left feeling intimidated by the police's "oppressive manner".

In a ruling delivered at Central London County Court, he said that Gloucestershire Police breached protesters' rights to freedom of expression and freedom of peaceful assembly.

The High Court and Court of Appeal had already ruled police acted unlawfully in holding protesters on the coaches.

Source: <https://www.bbc.co.uk/news/uk-england-gloucestershire-21382889>

###### Case 6: Article 10 (Right to Freedom of Speech)

You have come into school with a free Palestine badge on your blazer and have put up posters about the Israeli apartheid. You then get called to the headmaster's office who calls you a terrorist sympathiser, suspends you for a week and threatens you with exclusion if any vocal expression of support for Palestine continues.

Source: <https://www.middleeasteye.net/news/israel-palestine-uk-students-punished-protests-activism>

###### Case 6: Article 5 (Right to Liberty and Security)

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Source: <https://justice.org.uk/counter-terrorism-human-rights/>

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